IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION

VOCALSPACE, LLC,	§	
Plaintiff,	§	
vs.	§	**Civil Action No: 4-09 CV 00350**
DANIEL D. LORENSO and LARKSPARK CORPORATION,	§	
Defendants.	§	

PLAINTIFF'S AMENDED SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Plaintiff, VocalSpace LLC ("Plaintiff" or "VocalSpace") and files this Amended Sur-Reply in Opposition to Defendants' Motion for Partial Summary Judgment, and, in support thereof, respectfully shows the Court the following.

I. INTRODUCTION

Defendants' motion for partial summary judgment regarding Plaintiff's Computer Fraud and Abuse Act claim should be denied because Plaintiff has offered sufficient evidence of damages.[1] While Defendants argue that there is no evidence to support the damage element of this claim, Plaintiff has supplied the Declaration of Randy Dryburgh, documentary evidence of damages in response to Defendants' Second Requests for Production, and deposition testimony to show that it suffered damages as a result of Defendant Lorenso's unauthorized transmission of

[1] In their reply brief, Defendants conceded that their motion for summary judgment should be denied with respect to the existence of the "independent contractor agreement" and Plaintiff's copyright infringement, unjust enrichment, misappropriation of trade secrets, breach of fiduciary duty, constructive fraud, unfair competition, fraud, Theft Liability Act, and accounting claims. (Doc. No. 160, p. 2).

a program onto Plaintiff's protected computers. This evidence is sufficient to support Plaintiff's motion for summary judgment on the claim. Accordingly, it most certainly establishes a fact issue with respect to Defendants' motion for summary judgment ("Motion"). Therefore, Defendants' Motion should be denied.

II. ARGUMENT AND AUTHORITIES

A. Defendants' Motion Should Be Denied Because The Evidence Overwhelmingly Supports Plaintiff's Computer Fraud And Abuse Claim (Claim 2).

Defendants' motion should be denied because there is substantial evidence to support each element of Plaintiff's Computer Fraud and Abuse Act ("CFAA") claim, including the damages element. To establish a civil violation under the CFAA, the plaintiff must establish three elements: 1) the knowing "transmission" of a "program, information, code, or command;" 2) the transmission is "to a protected computer;" and 3) the transmission causes intentional "damage without authorization." 18 U.S.C. § 1030(a)(5)(A) (2000). Contrary to Defendants' assertions, there is ample evidence of damages suffered by Plaintiff resulting from Defendants' violation of this Act. Also contrary to Defendants' suggestion, the evidence shows that Defendant Lorenso, without authorization, placed a rule into Plaintiff's server.

B. The Evidence Shows That The Transmission Caused Intentional Damage Without Authorization.

There is ample evidence showing that Lorenso's transmission damaged Plaintiff, and Plaintiff's production of this evidence dates back to September 2010. *See, e.g.*, VS059553-VS05961, attached hereto as Exhibit A. This production unequivocally shows payroll records reflecting payments to Phillip Boles, who was specifically hired to remedy the unauthorized transmission by Lorenso. *See id.* An excerpt from Exhibit A, showing part of Plaintiff's damages stemming from Defendants' actions, is shown below.

Employee Information	[redacted]	Rate	Hours	Amount	Federal Taxes	State/Local Taxes	Deductions	Net Pay	Check Cleared?
[redacted]	[redacted]			[redacted]				[redacted]	[redacted]
BOLES, PHILLIP L #0013 [redacted]	[redacted]			2,000.00 2,000.00 4,000.00				Net Pay 6000.00 Direct Deposit	

For support of their Motion, Defendants repeatedly claim that Plaintiff has not alleged "loss to one or more persons during any one year…aggregating at least $5,000 in value" as required to state a civil claim under the CFAA. *See* Doc. No. 160, p. 3. Plaintiff, however, has alleged damage exactly as required by the statute. Specifically, Plaintiff has offered the substantiated declaration of Randy Dryburgh, which explains that VocalSpace was forced to rebuild the VocalSpace system, at a $38,000 cost to VocalSpace, due to the damage from Defendant Lorenso's actions in transmitting a rule to VocalSpace's server. *See* Dryburgh Declaration, Doc. No. 143, Ex. A, at ¶ 15. In addition, and contrary to Defendants' assertions, Plaintiff has also produced to Defendants documents which evidence the damages caused to the VocalSpace system by the actions of Lorenso. *See* Exhibit A. In particular, Plaintiff produced the payroll documents of the employee VocalSpace was forced to hire to rebuild the system as a result of Lorenso's actions in transmitting a rule to VocalSpace's server. *See id.* Moreover, the deposition testimony of James Adams explicitly states:

> Q: Okay. What did you spend on rebuilding the network; can you explain that?
>
> A. Yes, we hired somebody who worked about 70 hours a week for four months to rebuild every single server.
>
> Q. 70 hours a week for four weeks?
>
> A. Four months.
>
> Q. Four months. I'm sorry. So how much did that cost?
>
> A. 9,000 a month times four.

> Q. Okay. So, it was $36,000, and I believe I've asked for these documents in discovery, and the response was there were no documents.
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>
> Q. Were they [VocalSpace servers] due for an upgrade anyway?
>
> A. Not in the fashion that we had to do it. Wipe them out. Wipe them clean and start from scratch. Typically, you can just update. Not having to rebuild the entire machine.
>
> Q. Yum update, just updates the server that doesn't - -
>
> A. - - yeah. That's a normal update. But we didn't do that. We stripped it all. We format - - I believe we formatted machines and started from scratch.
>
> Q. And you want Mr. Lorenso to pay for that?
>
> A. Yeah.
>
> Q. Under what basis?
>
> A. Because we felt we needed to rebuild all the machines, because we were concerned that he had left a backdoor as he had done at a previous employer.

Deposition Transcript of James Adams, attached hereto as Exhibit B, at 204:1-11; 206:6-19. From this testimony, it is clear that VocalSpace was forced to hire to rebuild the system as a result of Lorenso's actions in transmitting a rule to VocalSpace's server.

Lorenso's addition of the rule to VocalSpace's servers was intentionally used to cause damage to VocalSpace without authorization. *See* Dryburgh Declaration, Doc. No. 143, Ex. A, at ¶ 14; Deposition of Daniel D. Lorenso (Doc. No. 143, Ex. H), at 271:5-9. Lorenso used the rule to copy VocalSpace's protected information to Larkspark's servers. Dryburgh Declaration Doc. No. 143, Ex. A, at ¶ 14; *see generally* Laws Declaration and Expert Report Doc. No. 143, Ex. I. In essence, through the use of the rule, Lorenso furthered his theft of Plaintiff's trade secrets and copyright infringement. Further, by doing so he exceeded any authorization from VocalSpace. *Id.* In fact, Lorenso's authorization, if any ceased when he obtained an adverse interest and effected a breach of loyalty to Plaintiff. *See, e.g., Shurgard Storage Centers, Inc.*, 119 F. Supp. 2d at 1123. As stated in Plaintiff's Response, Plaintiff was damaged as a result of this unauthorized activity, including, but not limited to damages arising out of wages in the amount of $38,000 paid to an employee to rebuild the VocalSpace system. *See* Dryburgh Declaration, Doc. No. 143, Ex. A, at ¶ 15. The VocalSpace system was damaged due to Defendant Lorenso's actions in transmitting a rule to VocalSpace's server. *See id.*, at ¶ 15 ("***As a result of Lorenso's actions***, VocalSpace hired a new employee to rebuild the VocalSpace system") (emphasis added). Thus, there is substantial evidence that Lorenso violated the CFAA, and Defendants' Motion must fail.

C. The Evidence Shows That Lorenso Knowingly Transmitted a Program to a Protected Computer.

Defendants denying that Defendant Lorenso put a rule in Plaintiff's server is belied by the evidence. Lorenso, after being notified that his position was being terminated, used his knowledge of the VocalSpace security infrastructure to add a rule to the VocalSpace firewall server, allowing LarkSpark servers unfettered access to VocalSpace servers, and providing him the means to copy the proprietary VocalSpace code and databases. Dryburgh Declaration, Doc. No. 143, Ex. A, at ¶ 13. In fact, Lorenso practically admitted as much in his deposition. He stated:

> Q. Did you add a rule to their server that you could access the VocalSpace server from LarkSpark's server?

A. I can't even confirm whether that's true. But it does sound like something I would have done.

Deposition of Daniel D. Lorenso, Doc. No. 143, Ex. H, at 271:5-9. Furthermore, Dryburgh found the rule while looking for suspicious activity on the network and removed it immediately. Dryburgh Declaration, Doc. No. 143, Ex. A, at ¶ 13. This revealed that it was Lorenso who placed the hole in the firewall. The deposition testimony of James Adams below explains:

A: …Randy did a reverse on it and that's how it turned out be.

Q. How can you tell it was him [Lorenso] that did that?

A. Nobody else would have done that. At his colo facility it was colo for Dallas, that's where he was hosting his stuff.

Deposition Transcript of James Adams, Doc. No. 143, Ex. D, at 306:17-22. Lorenso was not authorized to make this change. Dryburgh Declaration, Doc. No. 143, Ex. A, at ¶ 13. Thus, the evidence establishes that Lorenso knowingly transmitted at program to a protected computer, and Defendants' motion for summary judgment should be denied.

D. Defendants' Interpretation of the Plaintiff's Discovery Responses Is Unfounded.

Defendants contend that merely because Plaintiff objected to one of Defendants' Requests for Production, "Plaintiff cannot produce any documentation of damages to their system." *See* Reply, at p. 4. This does not follow. Specifically, Defendants' Request No. 40 sought "all documents which show that any of VocalSpace has suffered damages such as damage to its computer systems and servers as a result of any action by the defendant." *See* Reply, at p. 4. Plaintiff objected to the Request as vague, ambiguous, and compound. Defendants cannot expect Plaintiff to interpret the meaning of Defendants' request without more specificity than that provided in the Request. Further, Plaintiff supplemented its responses and produced documents merely a few weeks later. *See* Exhibit A. Notwithstanding Plaintiff's objection, Plaintiff still produced responsive documents, such as VS059553-VS059553. *See* Exhibit A. Therefore, Plaintiff's objection had merit, and Defendants have no basis for complaining of Plaintiff's Response when Plaintiff has, in fact, produced responsive documents to Defendants.

III. CONCLUSION

For the foregoing reasons, there exist fact questions regarding Plaintiff's claim of violation of the Computer Fraud and Abuse Act. Accordingly, Plaintiff requests that the Court deny Defendants' Motion. Plaintiff further requests any other relief to which it may be justly entitled.

Respectfully submitted,

/s/ Brian A. Colao_______________

Brian A. Colao
Bar No. 007933278
Neal G. Massand
Bar No. 24039038
Mina R. Saifi
Bar No. 24066801
Dykema Gossett PLLC
1717 Main Street, Suite 4000
Dallas, Texas 75201
(214) 462-6400 (Telephone)
(214) 462-6401 (Facsimile)

ATTORNEYS FOR PLAINTIFF VOCALSPACE LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on January 21, 2011. Any other counsel of record will be served by First Class U.S. Mail on this same date.

/s/ Brian A. Colao_________________________